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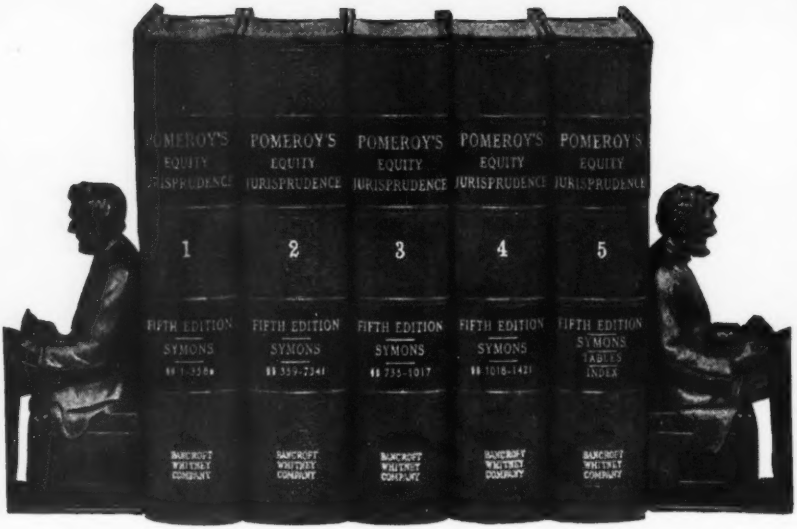

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The New Trademark Law...

By BEEKMAN AITKEN,
of the New York Bar

THE Federal Lanham Act of 1946 became effective July 5, 1947. The law affords registered owners far-reaching benefits and greater assurance against encroachments by others. It is a codification and modernization of prior acts and makes registration a practical necessity. Prior acts granted mere procedural rights; notably, the right to seek redress in the federal courts without diversity of citizenship. The new act grants valuable substantive rights not heretofore enjoyed under either the common or statutory laws. The most important of these are the provisions that certificates may become incontestable and are constructive notice of the rights of owners.

Certificates Granted. Heretofore marks were registered under the Acts of 1905 and 1920. A certificate under Act of 1905 was prima facie evidence of ownership and exclusiveness in the mark, whereas those under the Act of 1920 did not carry this presumption but afforded the right to sue in the federal courts and to register in foreign countries requiring registrations here. Descriptive, geographical and personal name marks could not be registered under the Act of 1905, but could be recorded under the Act of 1920. The new law establishes a Principal Register and a Supplemental Register, (herein referred to as "PR" and "SR"). Certificates in the PR are similar to those granted under the 1905 Act and those in the SR are similar to those issued under the Act of 1920.

Incontestability. All 1905 Act certificates may be transferred to the PR by filing a formal petition that that mark is being used on the goods and a title report showing the petitioner is the owner. These are republished in the Official Gazette and are not subject to opposition by others. They become incontestable five years after publication and cannot be cancelled, even by a prior user. This is in sharp contrast to the old laws which permitted cancellations at any time, and did not recognize the equitable defenses of laches, estoppel and acquiescence, which defenses are now made available. During this "statute of limitations" of five years certificates are subject to cancellation, but if not attacked they become *conclusive evidence* of the *exclusive right* of the registrant to

the mark. The only four defenses then available against such a registrant are either that its use infringes a valid common-law right acquired through prior use, or that the mark has been abandoned, or that the mark misrepresents source, or that there has been fraud, or that the mark is used to violate the anti-trust laws. But although such showings may negative incontestability, together with the conclusive right to exclusive use, they neither destroy the right to use the mark nor the right to claim; the certificate remains prima facie evidence of the exclusive right to use. Where others prior to the effective date of the act have obtained lawful concurrent territorial rights, these rights are unaffected by the incontestable certificate. Otherwise the incontestable certificate gives a nationwide right to exclusive use and there can be therefore only *one* lawful user in interstate and foreign commerce. Moreover, the owner of the certificate will have a superior right to expand use of the mark into territories theretofore unoccupied by another lawful concurrent user. Hence trademark owners should be alert in cancelling conflicting marks before they become incontestable; they can no longer wait until the adverse use becomes competitive. Marks applied for and registered in the PR secure the same incontestable rights five years after registration.

Constructive Notice. All certificates, except 1920 Act and SR certificates, are made constructive notice of the rights of the registrants. In the past courts protected a newcomer who without knowledge adopted the mark of a prior user for use in territory neither occupied by the first user nor in which its mark had become known. Hereafter all later users will be deemed to have knowledge of prior use of registered marks and will be treated as infringers, whether their use is in interstate or in purely intrastate commerce. Those who fail to search the Patent Office records act at their peril, even though merely local use is intended. Under former decisions no protection was gained from federal registration in states where no sales had been made. Hereafter, registrants under all acts, except under the 1920 and under the SR, will no longer find it necessary to expand use into every state to secure national protection. They are now assured their certificate covers all states. There are thousands of well-known marks which have never been registered under the old laws as the owners relied on use rather than registration, as the latter only conferred procedural rights. Surely the new rights of incontestability and constructive notice are strong incentives for all trademark owners to file at once to secure certificates with all speed.

Constitutionality. The incontestability and constructive notice provisions are clearly constitutional. Congress by our Constitution was granted broad powers to regulate interstate commerce. Trademarks are important aids in such commerce; it follows and is apparent that Congress had power to legislate upon the substantive law of trademarks. The Supreme Court has upheld the constitutionality of the Federal Trade Commission Act, to prevent the unfair use of trade indicia, and the Miller-Tydings Act to permit price-maintenance of trademarked products. There is no doubt but that the new law would be also upheld.

Distinctiveness. Under the old acts no exclusive rights were obtainable in descriptive, geographical, and personal name marks, unless they had been in use for ten years prior to the 1905 Act. These may now be registered in the PR if they have become in interstate commerce distinctive of the goods; and proof of substantially exclusive and continuous use for five years preceding filing is accepted as prima facie evidence of distinctiveness. This is merely a convenience, not a criteria, as distinctiveness may be obtained irrespective of length of use; and possibly overnight the word may become significant and acquire a predominant trademark implication. And the five years' use may be intrastate followed by interstate use. Moreover, irrespective of distinctiveness or length of use these marks are registrable in the PR unless they are "primarily merely a surname" and have no other significance, or are "merely geographical" when applied to the goods and mean only a location or place, or are "merely descriptive." If they are any of these, they may, however, be recorded in the SR, provided they are capable of distinguishing the goods or services. Many registered marks under the Act of 1920 are incapable of distinguishing and will not qualify for inclusion in the SR. To secure registration in the SR the mark must be in use for one year but this need no longer be an exclusive use. And the full use for one year may be waived if the mark is used in foreign commerce and the certificate here is necessary to acquire protection abroad. There is no provision for transferring either 1920 Act or SR certificates to the PR after they become distinctive; hence new applications must be filed. However, PR certificates may be amended to strike disclaimers of matter that has since become distinctive, provided the nature of the mark is not materially changed.

Concurrent Registrations. There already exist many well-known concurrent and lawful uses created either by the parties or by court decrees, but the old acts recognized only one first

user and permitted registration to only one owner. The new act provides that where there are two or more users, the right to use affords the right to register. Concurrent registrations may be granted if all uses are prior to the filing date of any application, and the uses in different territories are lawful and not infringing uses, and will not confuse purchasers. Concurrent registrations may also be granted in the same territory provided the goods are sufficiently different to avoid confusion; and in such instances separate certificates, rather than concurrent, may be granted.

Related Uses. In the past licensing the use of a mark was recognized by the courts but was considered as undermining its purpose, to indicate a single source. The new law recognizes the right of a concern to register a mark used by a related company which it legitimately controls with reference to the nature or quality of production or distribution of the goods or services. Hence, a maker of fabrics may license the use of its mark to manufacturers of the finished apparel, and this use inures to the benefit of the licensor who may register the mark as its own. A parent corporation may register marks used by its subsidiaries. A cooperative may register marks used by its members. Accordingly, it is no longer necessary for the owner of the mark to actually sell the goods or perform the services; and, if this is done by an entirely independent concern, under its direction, it suffices. But only the licensor acquires the right to register. However, improper uses, such as cessation of legitimate control or resultant public deception, invalidate the mark and the certificate may be cancelled. Hence, great care should be exercised in strictly controlling use of the mark by a related company and in preparing labels so there will be no possible mistake in the origin of the goods.

Duration. Certificates still remain in force for twenty years and may be renewed indefinitely for like periods as long as used. However, the renewing of a 1905 Act certificate under the new act does not secure to it the benefits of the act, including the right to incontestability. These may only be acquired by affirmatively transferring the certificate to the PR. Moreover, unless an affidavit stating that the mark is still being used is filed between the fifth and sixth years after the benefits of the act are acquired, the certificate is automatically cancelled by the Commissioner. The same applies to first term renewals, and to marks granted in both the PR and SR. This will clear the records of much "dead wood" and, coupled with the registration of many marks in use, will make the search files more reliable. Nonuse under special cir-

cumstances, together with a showing of no intention to abandon, may be excused. Otherwise, nonuse for two years is deemed prima facie evidence of abandonment. Marks registered under the 1920 Act, which were formerly perpetual, expire twenty years after their grant or six months after the effective date of the act, July 5, 1947, whichever date is the later. Many will therefore expire on January 5, 1948. Prompt steps should be taken to re-register these in either the PR if they have become distinctive, or in the SR if they are capable of distinguishing origin.

Assignments. New certificates are granted to assignees for the unexpired terms. The old law which provided that marks may be assigned only in connection with the good will of the entire business, is relaxed to permit assignments in connection with any portion of the business if the public will not be deceived thereby. In view of this, concurrent territorial, full or partial, assignments of marks are possible if no deception results; in addition, a partial assignment may be made in the same territory covering different goods, the assignor retaining rights in the remaining goods, provided confusion will not be likely.

Broader Protection. Formerly, registration was refused if a mark in prior use was applied to "goods of the same descriptive properties." The new act discards this unsatisfactory and often circumscribed test, and provides that mere likelihood of confusion, mistake or deception is the criteria; and possible confusion as to source is sufficient. In this respect, the act adopts the now settled law of the federal courts that if the public might believe the new goods to emanate from the prior user of a well-known mark, it is immaterial whether the goods are similar; they need only be related. Under these decisions, the owner of WATERMAN enjoined its use for razor blades, the prior user of DUNHILL enjoined its use for shirts and for a restaurant, and the owner of NUJOL enjoined its use for figs. As to the similarity between the marks themselves, the test remains whether they are sufficiently alike in sound, appearance or meaning to mislead the average individual. VOO, for example, was considered too similar in sound to DEW; and even a common suffix is enough to bar, as EDGECRAFT as applied to hosiery was held confusingly similar to ARTCRAFT for the same goods. The word BOUQUET was refused as another had registered the design of a bouquet of flowers.

Supplemental Register. Marks registered in the SR are neither constructive notice nor do they ever become incontestable. However, they afford registrants the right to sue in the

federal courts without diversity of citizenship and also to register in foreign countries which require registration here. Besides marks formerly registrable under the Act of 1920, the act provides that labels, configuration of goods, packages, slogans and phrases may be registered in the SR. But if these have become distinctive they may be registered in the PR.

Abandonment. Heretofore in order to show another had abandoned a mark it was necessary to prove the disuse was with the intent to abandon; and this was usually impossible. The new act provides disuse for two years is prima facie evidence of abandonment. The burden is thereby shifted to the one claiming priority to show it intends to resume use. Additionally, the new act provides for "constructive abandonment" by stating that any act of omission as well as commission which causes the mark to lose its significance as an indication of origin is abandonment. These acts include use of the mark as a common descriptive term, permitting others to use the mark without the control and supervision of the owner, and allowing the mark to become generic of a formerly patented article.

Affixing Mark. The old acts made a strict requirement that the mark must be actually affixed to the goods. Under the new act placing the mark on displays associated with the goods is enough. Hence, advertisements displaying cigars and cosmetics are now valid trademark uses, although they were held invalid under the old law. But actual use in interstate or foreign commerce is essential before filing. The applicant need not manufacture the goods, as it is enough if he is the seller or lessor of the goods. But mere adoption or invention is not enough.

Service Marks, etc. For the first time service marks used in the sale or advertising of services, such as laundries, may be registered. The same service mark may also be registered as a mark applied to goods sold. A cleaning establishment, for example, may register a mark for cleaning fluid it sells and may also register it as its service mark. Distinctive features of radio advertising are included as service marks; and perhaps this was done upon the theory that the sponsor controls as a related company the broadcaster which renders the service, and may therefore register the service mark in its own name. Collective marks which denote regional or other origin, such as that the goods are manufactured by a union or by farmer co-operatives, are registrable. Certification marks used to designate a mode of manufacture, quality, accuracy or other characteristics of the goods are registrable. For example, "Approved by

Good Housekeeping" may be registered. However, if legitimate control over its use is lost by the owner, or if the owner discriminates, the certificate may be cancelled.

Other Benefits. Under the 1905 Act the infringing use had to be in interstate or foreign commerce before a right of action existed. The new act provides the infringing mark need only be intended for use in such commerce. Advertising the registered mark of another is infringement if the acts are likely to cause confusion. Infringers are liable for both profits made and damages sustained by the registered owner. In assessing profits the owner need only prove sales and the infringer must then show all elements of deduction or cost. Decrees are enforceable in all other districts by contempt proceedings. Federal courts may cancel, reinstate or modify certificates granted by the Patent Office. All decrees are marked upon the Patent Office file wrappers of registered marks. All infringing materials may be required to be delivered up for destruction. In Patent Office opposition and cancellation proceedings the certificate is evidence of the validity of the mark, of its adoption and continuous use, and the registered owner thereby avoids the expense of taking testimony to prove these elements. Upon complying with Treasury Department rules copies of a certificate issued in the PR may be filed with custom officials at ports of entry to prevent the importation of cheap, competitive goods, bearing spurious marks.

Recommendations. Adopters of new marks to avoid infringement must first search Patent Office records. The Patent Office has classified goods into forty-nine classes, but it is not sufficient to search in the single class in which fall the goods to which it is intended to apply the mark. Other classes covering goods and marks that might possibly conflict should also be searched. Those now owning certificates should carefully review them and tabulate the dates of the registrations, the numbers of the certificates and the marks covered. This information should be supplied to a competent trademark attorney to enable him to give recommendations as to the proper steps to be taken to obtain the full benefits of the act and to protect the owner against possible loss of protection through default or inadvertence.

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.

—*Sir Walter Scott*

The Philosophy of Rights

A Dissent from Mr. Danielson by ALBERT J. STEISS

IN 1934 over the streets of Cologne, Germany, the writer saw banners which read, "You are nothing, the people is everything." It was somewhat startling in the July-August 1947 issue of *CASE AND COMMENT* to come upon almost the same statement in an article by Richard E. Danielson entitled "The Right to Strike": "In all rights, the individual is nothing, the public everything." It was even more startling to reflect that the statement was made without—apparently—any consciousness that the principle is revolutionary; and that the mere fact of its publication indicates a confidence that a great many who will read the article are already of a similar mind.

So far as the right to strike is concerned, Mr. Danielson's conclusions are consistent with a moderate and fairly standard view which can be formulated thus: There is an order of precedence among rights; in a conflict of rights, other things being equal, public considerations outweigh private; even rights of equal grade may mutually limit one another, as when several children claim support from one father; and the right to strike can be understood only in the light of these qualifications. There will be few to quarrel with this conclusion; it is generally reached from premises quite opposite to Mr. Danielson's; and it represents, in fact, the belief of this writer.

The quarrel is with the premises to which most of Mr. Danielson's article is devoted. They comprise an outline of a philosophy of rights of which the main features are as follows: The immortality of man is an unprovable assumption. There is no difference between rights and privileges and none is inalienable; all rights are transitory. Someone must always pay for rights and if the price is refused, the rights cease to exist. The individual has no rights as against the public.

It seems appalling that such a philosophy should be general or even current in America. So far as it is general, it means that a terrible war has been fought without any serious reason of principle at all, and that we differ from Nazis and Fascists in nothing except, let us say, their coarser sensibilities and their grosser estimate of national expediency.

It is here submitted that a deep conviction of the sacredness of individual rights is a vital element of the American tradition; and that one cannot see it abandoned, even by a minority, without sorrow. It would seem especially deplorable if it were lost as it were by default; that is, merely because

one has not troubled to examine whether it is really his conviction or not.

If one has come to Mr. Danielson's position as the result of long and careful study, it is unlikely that a few pages of argument will change his mind. Often, however, we accept conclusions merely because no others are offered and we do not inquire what our thoughts on the matter really are. The following outline is offered as an aid towards such an inquiry or self-examination. The elements of Mr. Danielson's philosophy of rights are set forth, step by step. The dissent represents the writer's own convictions in the matter. These convictions are not original; the writer believes that they are implied by our constitutional and legal traditions; that they are reasonable and consistent, and given sufficient space and time for study and debate could be thoroughly justified; that they are in fact true. If the outline below serves, however, to show the reader where his convictions really lie, the result will be preferable to not knowing or not caring.

Quotations from "The Right to Strike" by Richard E. Danielson

NATURE OF MAN

"It is a pleasant and ennobling thought—that God endows each one of us with a ready-made assortment of inalienable rights and justifiable claims against the rest of the world. As a basis for eighteenth century political metaphysics, it is as fascinating an assumption as may be found. But it is an assumption, nothing more nor less, and worth no more than any other unprovable hypothesis. Dogmatists may base a system of theology on the assumption that a babe, born or unborn, is the possessor of an immortal soul; and if you grant that assumption, the theology which follows it is unassailable. If you deny that major premise, the logical theology based on it becomes nonsense."

Dissent

The writer is convinced of the immortality of the soul on both philosophical and theological grounds. But let this pass. It is not the writer's purpose to base an argument on theology. And it is possible to find a starting point for a philosophy of rights in a principle nearer to experience and on which agreement is more general. Thus:

Man is a rational animal. He has animal faculties such as sight, feeling, motion; and two specifically human faculties, reason and free will, which set him apart from all other animals. The proximate end of man, that is, the purpose of his actions within the scope of earthly life is to perfect himself by the right use of all his faculties. Right

use denotes an orderly relation of each faculty to all the others; a subordination of lower faculties to higher; a government of reason. Man has an obligation to pursue this end, based on the premise that there is an intelligent principle in nature which intends that natural powers shall be used and potencies realized.

NATURE OF RIGHTS

"Our ancestors, in their long and stubborn struggle to conserve their ancient liberties and to expand them, consistently referred to their established 'rights and privileges.' We might do well to assume that this phrase describes a likeness and not a difference. We may fairly base our definition of rights on the theory that they were and are privileges, granted to us at one time or another as the result of all kinds of pressures and forces."

Dissent

A right is what is due. A man has a right to do and have those things necessary for the proper use of his faculties: that is, for the fulfillment of his purpose as a man. Thus an ultimate basis of his rights is his own nature; his obligation to perfect himself by the use of his natural faculties.

A privilege is something beyond what is due, granted by one having authority, out of a kind of generosity.

PERMANENCE OF RIGHTS

"Many rights and privileges have been granted which turned out to be valueless or vicious. *Le Droit du Seigneur* . . . The Divine Right of Kings . . . the right to own chattel slaves . . . such instances show that rights come and go . . . *They are amendable, transitory, impermanent arrangements.* . . . I know of no exception whatsoever to this general rule or principle."

Dissent

Particular rights are generally based partly on man's nature, partly on circumstances. Thus his right to own property is based directly on his nature, but not the right to own this house or that. His nature does not change and so far as his rights derive from nature they do not change either. The fact that the "Divine Right of Kings" and the right to own slaves were once widely acknowledged does not show that rights are transitory, just as Galileo's discovery that the earth moves around the sun did not show that the course of the heavens is transitory. The validity of the comparison, of course, rests on the supposition that rights like the heavenly bodies have an existence independent of our thoughts and intentions concerning them.

"PRICE" OF RIGHTS

"(Rights) are privileges, granted by the public and paid

for by the public because the public believes it is well to make such payment for the public good and the future of mankind. . . . *Someone always pays for them.* They are not inherent; they are bought and paid for by someone, somewhere, sometime. *Always!* . . . Consider the foremost claimant among them: the right to life, the right to live. The naked, newborn infant is in no position to make good his claim to this proud privilege. . . . Someone or some people fight and pay for his food, his health, his training, his clothing, his education. In other words, people *pay* for the *right* to keep children alive. If this right were not paid for, it would cease to be."

Dissent

Duty is the correlative of right and in some way may be called the price of right. That is, there can be no rights without corresponding obligations. But this is not to say that a right no longer exists if the obligation is not acknowledged, that is, if the price is refused. For example, a man cannot have the right to physical security unless it is someone's obligation to provide this security. Let us say the obligation rests upon the police, as agents of the state. (It rests also, of course, upon potential murderers, kidnappers and robbers who might have an interest adverse to this right.) Now, suppose the police do not function impartially and justly. They will not have fulfilled their obligation which is surely not to say that the obligation and its correlative right no longer exists. This was the case with Himmler's police in Germany and the occupied countries; and it is only by way of satirical exaggeration that we might raise the question whether the citizens of those countries had any right to security.

Inalienability of Rights

"In all rights, the individual is nothing, the public everything. Apparent inconsistencies with this rule will not bear the light of analysis and examination. . . . As an individual you have no right or claim to anything. This is where our Bills of Rights become documents of confusion. . . . An inexpedient right, or one whose exercise is contrary to the general welfare, simply ceases to exist."

Dissent

No single definition or principle can cover this matter adequately. Let us try several:

Only one right, inner freedom of conscience, is inalienable in the strict sense, but as this right affects only the internal forum where the writ of the State does not run, we are not here concerned with it. In this respect it will be noted that freedom of conscience is distinguished from freedom of exterior worship or freedom to teach.

Certain other basic rights, such as the rights to life and liberty, are called inalienable in a relative sense. It is submitted first of all that "relatively inalienable" is not a meaningless form of words and is not the same as "not inalienable at all."

It means for one thing that the natural facts on which such rights are mainly based—that is, man's nature and faculties—are permanent; that they are not the subject of legislation either to establish or abrogate them.

They are further considered relatively inalienable in the sense that they yield only to the gravest—and generally only to public—considerations. Thus the right to life and liberty is forfeited only through the most serious of crimes; the right to physical security is abridged only by so grave a claim as a soldier's duty to defend his country or a father's duty, let us say, to attempt to rescue a drowning child.

Moreover, the very limitation of the right of an individual is often an affirmation of the same right as it applies to men in general. Thus the execution of a murderer is conceived as a safeguard, and thus an affirmation, of other men's right to life.

Nor should it be objected that this is really an example of the individual being nothing in face of the public which is everything. In fact, apart from its governmental or political aspect, the public is only a word, a collective form of which the only real subject of reference is a plurality of individuals. Except as a political entity then, it is literally true to say that the public is nothing, the individual is everything.

Even using "public" in the sense of "majority" there is still a grave objection to the principle, "The individual is nothing, the public everything." It can be likened, without flippant intention, to saying, "Six is everything, and one is nothing."

An attempt has here been made to point out the error of a dangerous philosophic trend. It may be that the error can be shown more readily than the danger. We are prone to consider general ideas as belonging to a world apart, where our minds roam for exercise or holiday, but where we do not live. And yet there have been no forces in history, not even hunger, so dynamic and with so durable an effect, as philosophies and religions. The reason is that, in the world's course, ideas alone furnish direction as well as violence. The very philosophic principles here under discussion have during the past ten years proved to be among the grimmest motive forces of history. Perhaps the point is psychological rather than philosophical. If you hold an idea long enough, sooner or later you will act according to your idea.

Damages for Defamation by Radio

By MILTON S. MARKS of the New York City Bar

Condensed from Chicago-Kent Law Review, March, 1947

WITH a growing tendency on the part of more and more radio personalities to indulge in the practice of "ad-libbing," the legal problem posed in the case of *Locke v. Gibbons*[1] assumes greater importance. It had there been determined that as the alleged defamatory matter had been spoken into a microphone without the benefit of a written script the same constituted a slander, rather than a libel, so that in the absence of an allegation of special damage, no cause of action had been stated in view of the fact that the alleged defamatory matter was not slanderous *per se*. Had the same been treated as a libel, judgment for at least nominal damages would have been required. The reason underlying any such distinction rests purely on historical accident, has not passed uncondemned, and now seems wholly illogical when applied to cases of defamation occurring during a radio broadcast.

In *Summit Hotel Company v. National Broadcasting Company*,[2] the court acknowledged the special characteristics thereof by saying: "Publication by radio has physical aspects entirely different from those attending the publication of a libel or a slander as the law understands them. The danger of attempting to apply the fixed principles of law governing either libel or slander to this new medium of communication is obvious. But the law is not so firmly and rigidly cast that it is incapable of meeting a new wrong as the demands of progress and change require."

If distinction must still be drawn between libel and slander, it would seem that scientific developments dictate that the division should be between the manner of projection, whether simply oral or by mechanical impulse, rather than whether the defamation reaches the general public through the aural or the optic nerves. It is true that inventions have increased and im-

[1] 164 Misc 877, 299 NYS 188 (1937), affirmed without opinion in 253 App Div 887, 2 NYS2d 1015 (1938).

[2] 336 Pa 182, annotated in 124 ALR 968, 8 A2d 302 (1939).

proved the facility of circulating written or printed matter, but such progress is trivial compared to the potency bestowed upon the spoken word operating through mechanical devices for, through them, the defamation may not only be transmitted over the greater part of the earth in a moment of time but may be simultaneously fashioned into permanent form. Such verbal puissance did not exist when the courts first distinguished speech from writing or print. Any suggestion that such phenomena might some day be possible would have been ridiculed as beyond the realm of even the weird and fanciful. Yet it is now an accomplished scientific fact.

The existence of a distinction between the natural voice and the broadcasted one was noted by Justice Brandeis, in *Buck v. Jewell-LaSalle Realty Company*,[3] where he said: "We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the 'ether.' These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which activate the loud speaker to produce again in the air sound waves of audible frequency. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus." As the voice of the speaker does not travel the airways but merely sets a mechanism into action permitting an electrical product to be disseminated, the broadcast is the product of voice and electrical radiation combined. The voice alone could no more be called the source of defamation than could the finger which

[3] 283 US 191, 75 L Ed 971 (1931), 76 ALR 1266, 51 S Ct 410.

presses the trigger be called the source of the bullet which kills.

Should not the courts, then, attach different legal consequences to defamation spread completely by the pure natural voice as contrasted with that which is spread through an instrument activated by the human voice but made more dangerous by the tremendous potentialities thereby created? To hold that direct address to a present audience is legally the same as a radio broadcast is as preposterous as to assert that holding a lighted match in the ordinary atmosphere is the equivalent of placing it into a gas chamber!

It might be noted, bearing on the extensive character of the damage that is likely to follow, that spoken defamation may be less deleterious if limited to the locality of its utterance but that it bears inherent characteristics which can make it more damaging than print if given an identical sphere of publication with the latter. Modulation and inflection of speech carry more conviction than cold print. The chance of misquotation is multiplied, for the very fact that writing has a physical existence makes misquotation less likely. Pope well knew how speech might be distorted when he wrote:

> "The flying rumors gathered as they rolled
> And all who told it added something new
> And all who heard it made enlargement too
> In every ear it spreads, on every tongue it grew. . . ."

The courts can hardly be less aware of the danger inherent in a wide dissemination of defamatory matter of that character.

Quick Retort

The county attorney had presented members of the police force and other witnesses to identify the property as stolen, and establish that the respondent had knowledge at the time of taking it into his possession, then rested the case.

The attorney for respondent arose and called upon his client to take the stand with these words:

"Now, Mr. L—, go right around where that rail is and tell the jury all that you know and all that you do not know about this case ,"

When the Judge interrupted:

"How is he going to tell all that he does not know about the case?"

The attorney quickly replied:

"Your Honor, that is what the witnesses for the other side have been doing."

Contributor: Charles J. Nichols,
Portland, Maine.

Why I Am a Lawyer

By GEORGE W. DOWELL
of the Salem (Ill.) Bar

WHEN a young lawyer, I was a candidate for the nomination for the office of State's Attorney in one of the counties in southern Illinois. There were a great many colored voters residing in the county. One evening before the election I was sitting in the office and a delegation of colored voters called and told me that the colored people were having a meeting in a certain hall in the city and that the speaker of the evening was a colored minister from Chicago, invited by my opponent to address the colored voters in his behalf.

Reluctantly I accepted the invitation and went with the delegation to the hall where we sat in the rear of the room. The colored minister was speaking at the time and not knowing me, I am sure he never thought that I was the opposing candidate, being surrounded by and sitting with the colored voters. He was telling the audience why they should vote against me and vote for my opponent, during his talk, and on several occasions he told that they could believe what he said because he was a minister of the gospel, one of the few throughout the country that had received that high calling from God, and that as a minister with this high calling, he always told the truth and that they could believe what he said. After he had lambasted me for some twenty minutes and sat down, the Chairman, a colored person, called on my opponent to speak. My opponent got up very much embarrassed at me being there and especially because the colored minister had been saying some very bad things about me. In fact, my opponent was so embarrassed he had nothing to say except that he would like to be elected. After he sat down, the old colored Chairman, being a one-eyed person, looked over his glasses and saw me and said "Brethren, I see Mr. Dowell, the other candidate. We'd like to hear from him." A number of my friends in the audience began to insist that I speak. It not being my meeting, I hesitated to do so, but after much persuasion finally began in my weak way (as I told the audience) to speak. I stated that I was a young lawyer trying to make a living for myself and family and that I would like to be elected State's Attorney. Since the colored minister had told them about being a minister and the high calling of a minister and how truthful the ministers were, I said I

would like to tell them why I had decided to become a lawyer. In fact, the whole thing seemed to me to be an inspiration at an opportune time. I told them that when I was a small boy, four or five years of age, a salesman came by my home selling New Testaments and my mother bought New Testaments for all the children but me, thinking I was too small to read. When the salesman started away, I began to cry and mother called back the salesman and bought me one. I kept that little book, in fact I have it yet, and when I was old enough to read, in reading through the books of Matthew, Mark, Luke and John, I discovered that approximately 1900 years ago a babe was born who grew up to be a boy as other boys and when he became a man, he was a very devout Christian or religious character. He went over the country healing the sick, teaching the dumb to speak, the deaf to hear and the blind to see, even raising the dead, and he proved by his acts and his words to be the best man the world has ever known. Finally his enemies forced him to wear a crown of thorns and bear a cross of sorrow to Calvary where they nailed him to the cross in the most humiliating way possible. While the blood was running from his side and the nail wounds in his hands, everybody had apparently forsaken and left him, his disciples, preachers and all of his friends. While still on the cross, wounded, bleeding and dying, one man went up to Pilate, the High Priest who had caused Jesus to be nailed to that cross and he said to Pilate in substance, "Give me this man's body and I will place it in my tomb wherein man before was never laid." That man was Joseph, a counselor, and he was a good man and just. Now keep in mind the man that asked for the body of Christ was not a minister, he was a lawyer, and by that act a lawyer demonstrated to the world that the lawyers were the best people in the world. Therefore, I decided to be a lawyer.

After the meeting was over, the old colored minister came to me and said "You are the opposing candidate?" I said "Yes sir." He said "I shore didn't know you was here or I wouldn't have said what I did about you. I have read the Bible many times and I have read the same thing you speak about and I never did read it that way, but it is shore God there."

Trusts

"Trusts are children of equity; and in a Court of Equity they are at home, under the family rooftree, and around the hearth of their ancestors."

—*J. Bleckley*

How to Fight Communism

By J. EDGAR HOOVER,
Director, Federal Bureau of Investigation

—:—

OUR best defense in the United States against the menace of Communism is our own American way of life. The American Communists cannot hope to reach their objective of destroying our form of government unless they first undermine and corrupt it, causing confusion and disrupting public confidence in the workings of democracy.

Ours is the strongest democracy. We have more freedom and higher standards of living than any other people on earth. Yet our government—which has stood for almost two centuries as a beacon light amid world conflicts—is a central target of attack for the Red Fascists in the United States. It stands between them and world revolution.

We cannot ignore the attack. We must meet and repel it—but in the American way. We must shun the tactics of the Ku Klux Klan, the Columbians and native Fascists as earnestly as we shun those of the Communists themselves. There is as much danger in moving too far to the "right" as there is in swinging too far to the "left." There is little choice between Fascism and Communism. Both are totalitarian, anti-democratic and godless. Both use the same means of treachery and deceit to accomplish their goal of tyranny and oppression. In our fight against Communism we have no place for the political police that have dominated Fascist and Communist countries.

We effectively protected ourselves against spies and saboteurs during the late world war without sacrificing the civil rights of a single citizen. We can protect ourselves against the infiltration of Communism by the same defensive, democratic means in the American way.

Our surest weapon is truth. The Communists cannot endure the searching gaze of public observation. Their most effective work is carried on under a cloak of secrecy. Lies and deceit are their principal tools. No trick is too low for them. They are masters of the type of evasion advocated by that great god of Communism, Lenin, who observed: "Revolutionaries who

are unable to combine illegal forms of struggle with every form of legal struggle are very bad revolutionaries."

The first step in the fight to preserve the American way of life is the exposure of the true aims of Communism and then a contrast of them with our American way of life.

There are two levels in the Communist organization. One level is "above ground" and its espousers are out in the open. They employ high-sounding, deceitful phrases, and pin the label "Red-baiter," "reactionary," or "Hitlerite" on all who reject their doctrines. Anyone who opposes the Soviet Union is a "Fascist," "imperialist" or "monopoly capitalist." The Communist brigades of swindlers and confidence men extol democracy but when they do they are speaking of Communism and not the American brand of democracy. They conceal their real designs by attaching themselves to progressive causes, to the cause of labor, social security and education.

The other level—the Communist underground—is composed of the disciplined brigades of Communist conspirators who drop their dialectical double talk behind locked doors. There the dangers of Communism become real.

The preamble of the constitution of the Communist party provides that "The Communist party struggles for the complete destruction of Fascism and for a durable peace." This is typical Communist deceit.

We all remember when Communism and Fascism were open allies. In that period the Communists picketed the White House, opposed Lend-Lease, Selective Service, and the defense of America. When Russia switched from an ally to an enemy of Germany, the American Communists shifted overnight to all-out aid, full production, and the second front.

The preamble of the Communist constitution also states that the party educates the working class "for its historic mission, the establishment of socialism." This "historic mission" is a revolution intended to overthrow our democratic government and substitute a Soviet of the United States.

The fact that the Communists teach revolution by force and violence is well illustrated by statements of Communist functionaries. One instructor advised his class: "We must as workers learn to hate the capitalist class. We cannot fight unless we hate. We . . . the vanguard of the working class, must teach the worker . . . to hate. It will mean the spilling of blood. We will have streets of blood as they had in Russia. The worker must be organized so that revolution when it comes must not be a failure."

The Communists are agreed that the revolution will not come

until the precipitation of a "great crisis" such as a general strike, a war which could be turned into civil strife, or a great economic depression.

Our cue is to make democracy work so that the Communists will never have their "great crisis."

The Communists have been specific in defining the meaning of party membership. The Daily Worker quoted Stalin on the subject: "We have Lenin's thoroughly tried and tested formula defining a member of the party . . . . A member is one who accepts the program of the party, pays membership dues and works in one of its organizations."

The known, card-carrying Communist is not our sole menace. The individual whose name does not appear on party rolls but who does the party's dirty work, who acts as an apologist for the party and who rises in its defense and spearheads its campaigns in numerous fronts, is a greater menace. These are the "Communist sympathizers," "fellow travelers," and "Communist stooges." To prove their evil intent is at times difficult but they brand themselves by shifting and turning as the party line changes to meet new situations. Whether they be innocent, gullible, or wilful makes little difference, because they further the cause of Communism and weaken our American democracy.

The Communists are now carrying on a vigorous campaign to bring their total membership in the United States up to 100,000. This figure, however, does not reveal their actual strength. Conservatively, there are an estimated one million others who in one way or another aid the Communist party.

I heard a clergyman a few days ago, in opposing anti-Communist legislation, base his argument on the fact that in Germany and Italy "the attack on the rights of a very unpopular minority led to the attack on the rights of all the people." I have already expressed my contempt for Fascism in any form, nevertheless, I could not help but wonder whether we would not have been spared the destruction of the second world war had the German and Italian people been alert to their responsibilities in the early '20s and opposed the advance of Fascism with the same vigor the Americans are now opposing Communism.

We cannot hope successfully to meet the Communist menace unless there is a wide knowledge and understanding of its aims and designs. This knowledge outlaws the party in the hearts and minds of good citizens.

But where can this information be secured?

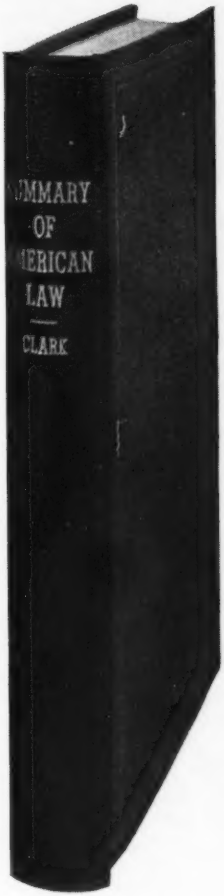
The American press and radio are alert to the threat of Red Fascism and have done a splen-

did job of exposing the evil. We are moving in the right direction.

I have also been encouraged to note that spokesmen generally are being circumspect in using the label of "Communist." The technique of the label is a Communist trick which anti-Communists are sometimes prone to use. It is deceptive and detrimental, however, to pin the label of "Communist" on honest American liberals and progressives merely because of a difference of opinion. Honestly and common decency demand that the clear-cut line of demarcation that exists between liberals and Communists be recognized. Despite the Communist technique of labeling themselves as progressives there is no more effective or determined foe of Communism than the millions of honest liberals and progressives.

Newspapers, magazines, radio and scores of well-documented books on the subject of Communism are sources of authentic information which can provide

"Now I wish I'd sued him instead!"



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patriotic citizens with the facts.

There is renewed interest in Congress as manifested in the Committee on un-American Activities of the House of Representatives. As this committee fulfills its obligation of public disclosure of facts it is worthy of the support of loyal, patriotic Americans. This committee has for its purpose the exposure of un-American forces and as such its files contain voluminous information which, when used with discretion, provide an excellent source of information. The FBI, unlike this committee, must of necessity keep the contents of its files confidential.

Citizens also should be alert to what is happening in their own circles. Do they have an intelligent, participating interest in the programs of organizations to which they belong and of schools which their children attend? What kind of people do they elect to public office? Are there disloyal people on the public payrolls?

It is the right and responsibility of every citizen to insist on having public servants whose first loyalty is to the American way of life. One disloyal local, county, state or Federal employe can do irreparable harm by acts of disloyalty or by indoctrinating others with a Marxian philosophy.

There is some sentiment that a Communist has as much right to a government job as a Democrat or a Republican, because the Communists claim to be a political party. In reality, they are a part of an international criminal conspiracy. They are no more a political party than was the German-American Bund.

Labor unions have always been a Communist target. The Communists have seldom departed from the Lenin instruction: "It is necessary . . . to agree to any and every sacrifice, and even . . . to resort to all sorts of devices, maneuvers and illegal methods, to evasion, and subterfuge, in order to penetrate into the trade unions, to remain in them, and to carry on Communist work in them at all cost."

The American view of trade unionism is summed up in the words of Samuel Gompers: "To be a good trade unionist a man must first be a good American."

Communists in labor unions—like Communists everywhere—owe their first allegiance to the Communist party. They falsely claim that the ends of the party and of labor are the same.

The majority of Communist party members do not even belong to trade unions. In a recent Communist meeting a party leader admitted that "18 to 19 per cent of our membership was obtained from organizational shops and industrial clubs throughout the United States."

Nonetheless, in one union with nearly 100,000 members, 500 party members were able to control the union. Another union with 8,500 members sought to

free itself from Communist control but failed despite the fact that there were less than 200 party members in the union.

In one instance a single Communist by clever manipulation at a union convention was able to dictate resolutions adopted by the convention.

Progressive American union members could quickly divest themselves of the Communist barnacles if they took as much interest in union affairs as the Communists do.

They should educate themselves to recognize the Communist party line so that they can identify the "fellow travelers" in their union. They should attend union meetings and take an unselfish interest in union elections. Above all, they should scrutinize the business affairs of the union to make certain that the union is using its resources for the welfare of its members and not for some "dressed-up" cause the Communists may be sponsoring.

Management can do more by looking out for the welfare of employes and getting closer to labor problems. In most disputes a satisfactory solution can be worked out if both sides will use decency and fair play as the basis for their dealings. More and more union members are awakening to the realization that Communist members owe their first allegiance to the party. The party line which argues that attacks against Communism are attacks on labor is a lie and the Communists know it. So do patriotic labor leaders.

The party sometimes recruits members by misrepresentation. A Negro party member, for instance, pointed out at a Communist meeting that many Negroes, when recruited, thought they were joinig a union instead of the Communist party. At this point the Negro was shouted down by party members.

Schools and colleges should be on the alert against Communist infiltration. To spread Communist propaganda and hate under the guise of academic freedom is not freedom but vicious license. Parents should take a greater interest in school affairs and know what organizations attract their children. Communists recruit future members through the high-sounding youth auxiliary, the American Youth for Democracy, formerly known as the Young Communist League.

The churches of America also are threatened by Communism. Ministers of the Gospel desecrate their faith when they describe themselves as "Christian Communists," and call for the overthrow of the "Economic Oligarchy;" when they say "Communism is a religion . . ." and "Religion is not so much about God, but about the nature of the world."

The churches of America should remember that the Communists' protestation of freedom of religion is a camouflage for

their true thoughts. Lenin taught: "We must combat religion—this is the ABC of all materialism, and consequently Marxism." "Down with religion!" "Long live atheism!" "The dissemination of atheist views is our chief task."

The ways of life advocated by the imported isms—Communism, Nazism, or Fascism—are inconsistent with the Christian way of life. Shorn of their fake cloaks they reduce men to the level of pawns. We should never forget that Communism begins with the group; democracy and Christianity begin with the individual.

No organization worthy of its name has been immune from Communist attempts to infiltrate. The more respected the organization, the greater should be the viligance.

Once organizations are captured by Communists, patriotic members have one of two alternatives; resign or organize to regain control. Their members should vote for officers who stand for the Constitution of the United States and not the Communist Manifesto.

If there were to be a slogan in the fight against Communism it should convey thought: Uncover, expose, and spotlight their activities. Once this is done, the American people will do the rest —quarantine them from effectively weakening our country.

Philosophical Redskin

Our ambition is nearly undermined by the fable of the Indian who was discovered by a bustling American super-magnate who was chagrined to see the redskin dozing at the door of his teepee while his squaw did all the work.

The magnate, highly incensed by this lack of enterprise, decided to inspire the Indian a bit.

"Chief," he said. "Why don't you go into town and get yourself a job in a factory?"

The Indian opened one eye lazily and contemplated the highly prosperous magnate. Then he closed his eye again and said: "Why?"

"Well," went on the m. enthusiastically, "you could earn a lot of money these days, maybe 75 cents, 85 cents an hour. Why, you could earn $30 or $40 a week."

This time the Indian didn't bother to open his eye. He just said: "Why?"

"Well," said the magnate, "if you worked hard and saved your money, pretty soon you'd have a bank account. Wouldn't you like a big bank account?"

"Why?"

"Well," said the magnate, "with a big bank account you could retire and you wouldn't have to work any more . . ."

The Indian opened his eye. "No working now," he said.

—*The Postage Stamp.*

Among the New Decisions

Automobiles — *measure of damages for injury to.* In Kohl v. Arp, — Iowa —, 169 ALR 1067, 17 NW2d 824, opinion by Justice Smith, it was held that the measure of damages recoverable for the loss occasioned by the total destruction of an automobile by another's wrongful act is the reasonable value of the automobile immediately before its destruction; and if the automobile, though not totally destroyed, is so injured that it cannot be placed in as good a condition as it was before the injury, the measure of damages is the difference between its reasonable market value before, and its reasonable market value after, the injury.

See the supplementary annotation in 169 ALR 1074 on "Measure of damages for destruction of or injury to commercial vehicle."

Bills and Notes — *liability of intermediate indorser.* In Denniston v. Jackson, 304 Ky 261, 169 ALR 1404, 200 SW2d 477, opinion by Stanley, C., it was held that whether the payee's renegotiation of a negotiable instrument which he reacquired after having indorsed and negotiated it is by indorsement or by delivery is not material so far as regards the question of the liability of an intermediate indorser to the new holder, for the delivery without indorsement is an adoption of the former indorsement and equivalent to a new indorsement.

The annotation in 169 ALR 1410 discusses "Liability of intermediate indorser where negotiable instrument is reacquired and renegotiated by prior party."

Brokers — *commission on sale closed through another.* Justice Lummus in Corleto v. Prudential Insurance Co., — Mass —, 169 ALR 375, 70 NE2d 702, wrote the opinion holding that it cannot be ruled as matter of law that a real-estate broker was not the efficient cause of accomplishing a sale of property listed with

him by the owner without fixing a price, to a purchaser brought into the negotiations by the broker, merely because the sale was finally closed through the instrumentality of another and the broker was not present at the execution of the contract or of the deed and knew nothing about them until afterwards, nor because the final terms differed from those proposed during his negotiations with the purchasers, nor because the owner paid a commission to the other broker.

The title to the annotation in 169 ALR 380 discusses "Real-estate broker's right to commission on sale, exchange, or lease of property listed without statement of price or other terms."

Brokers — *expiration of license as affecting right to commission.* Judge Turner, of the Ohio Supreme Court, wrote the opinion in Stanson v. McDonald, 147 Ohio St 191, 169 ALR 760, 70 NE2d 359, holding that a corporation which had a real-estate broker's license for the particular year in which negotiations were carried on for the leasing of property on a commission basis, but which did not renew or possess such a license for the following year when the deal was consummated and the right of action for commission accrued, cannot maintain an action to recover such commission, in view of a statute providing that no right of action shall accrue for the collection of compensation for the performance of services by a broker without alleging and proving that the plaintiff was duly licensed as a real-estate broker or salesman at the time the cause of action arose.

The annotation in 169 ALR 767 discusses "Want of license as affecting broker's recovery of compensation for services."

Brokers — *owner's refusal to complete sale.* The Florida Supreme Court in Knowles v. Henderson, 156 Fla 31, 169 ALR 600, 22 So2d 384, opinion by Justice Sebring, held that a real-estate broker who, in good faith and in reliance upon his contract, procures a purchaser who remains ready, able, and willing to buy property in accordance with the terms fixed by the principal, is entitled to his commission, although the principal, before the broker can effect the sale or procure a binding contract of purchase, defeats the transaction, not for any fault of the broker or the purchaser, but solely because the principal will not or cannot complete the transaction, since the principal is deemed thereby to waive compliance with the strict terms of his contract with the broker as to completing the sale.

The general question "Right of real-estate broker, employed to effect or consummate sale, to compensation where principal refuses or is unable to complete

transaction" is treated in the annotation in 169 ALR 605.

Burglary — *allegation of ownership of building entered.* In Sedlacek v. State, — Neb —, 169 ALR 868, 25 NE2d 553, opinion by Chief Justice Simmons, it was held that the specific ownership of the building involved in the crime of burglary is not an essential element of the offense and an allegation of ownership as such is immaterial except for the purposes of identifying the property where the crime is alleged to have been committed as not the property of the accused and to show that the defendant had no right to enter the premises.

The annotation in 169 ALR 887 supplements an earlier annotation on the question "Necessity of naming owner of building in indictment or information for burglary."

Burglary or Theft Insurance — *provision as to proof of loss.* In Davis v. St. Paul Mercury and Indemnity Co., 227 NC 80, 169 ALR 220, 40 SE2d 609, Justice Barnhill, of the North Carolina Supreme Court, wrote an interesting opinion holding that a provision of a theft insurance policy that the mysterious disappearance of any insured property shall be presumed to be due to theft creates a rule of evidence binding on the parties, and the insured is not required to produce evidence excluding the probability that the property was mislaid or lost and pointing to larceny as the more rational inference.

The annotation in 169 ALR 224 discusses "Provisions of burglary or theft policy as to evidence of loss."

Charities — *insufficiency of trust.* The Virginia Court of Appeals, opinion by Eggleston, J., in Thomas v. Bryant, 185 Va 845, 169 ALR 257, 40 SE2d 487, held that a charitable trust created by a bequest of the residue of the testator's estate in trust for the establishment and maintenance of a home for destitute and dependent aged white men and women living in a designated county, leaving to the discretion of the trustees the kind, size, and plan of the home, the rules of admission thereto, and the operation and management thereof, is not rendered invalid by the fact that the trust income may not be sufficient to establish and maintain a home on a large scale or be adequate to provide for the needs of all of the indigent aged of the county, where the income is sufficient to maintain a home adequate to care for a small number of such people and may thus be applied as far as practicable to carry out the testator's intent.

The annotation in 169 ALR 266 discusses "Charitable trust as affected by insufficiency of assets."

Constitutional Law — *hours of closing of lunch wagons.* In Hart v. Township of Teaneck, — NJ —, 169 ALR 973, 50 A2d 856, opinion by Justice Wachenfeld, it was held that an ordinance requiring all lunch wagons to be closed from 1 a.m. to 7 a.m. on all days is unreasonable and unconstitutionally discriminatory in failing to include within its terms other establishments in the nature of restaurants.

The annotation in 169 ALR 976 discusses "Discrimination as between restaurants or eating places in statute or ordinances respecting them."

Criminal Law — *definition of offense charged.* Federal Circuit Judge Stephens, of the Ninth Circuit, wrote the opinion in Morris v. U. S., 169 ALR 305, 156 F2d 525, holding that instructions given in a prosecution for violation of the Emergency Price Control Act of 1942 and the regulations thereunder by making false entries in statements as to sales made by the accused, which tell the jury only that if they believe certain enumerated facts beyond a reasonable doubt their verdict must be one of guilty of the offense charged, otherwise their verdict must be one of not guilty, without giving any explanation or definition or the enacted text of the offense charged, do not sufficiently define the offense and do not afford the jury opportunity of applying the facts to the law.

The annotation in 169 ALR 315 discusses "Duty in instructing jury in criminal prosecution to explain and define offense charged."

"I'll sue 'em for fraud!"

Divorce and Separation — *lien for alimony.* Justice Burr wrote the opinion in Leifert v. Wolfer, 74 ND 746, 169 ALR 633, 24 NW2d 690, holding that power conferred by statute upon courts awarding alimony or maintenance to require the giving of reasonable security for payment thereof and to enforce the same by appointment of a receiver "or by any other remedy applicable to the case" does not extend to making a provision for future monthly payments of alimony a

lien upon the property of the husband.

A supplemental annotation on the broader question of "Decree for periodical payments for support or alimony as a lien, or the subject of a declaration of lien," is discussed in the annotation in 169 ALR 641.

Evidence — *nurse's privilege.* Judge Hart, of the Ohio Supreme Court, wrote the opinion in Weis v. Weis, 147 Ohio St 416, 169 ALR 668, 72 NE2d 245. The Ohio Court adopts the majority view denying privilege communications in respect to nurses.

The later cases are collected in a supplemental annotation in 169 ALR 678.

Evidence — *res ipsa loquitur where injury caused by revolving door.* In Farina v. First National Bank, 72 Ohio App 109, 169 ALR 1341, 51 NE2d 36, opinion by Sherick, J., it was held that the res ipsa loquitur doctrine cannot be invoked by a bank customer who was injured by the collapse of a wing of a revolving door of the bank building as she was operating the door in attempting to depart from the building through it, since at the time of the injury the bank had no control over the door.

The annotation in 169 ALR 1346 discusses "Liability for injury by revolving door."

Evidence — *weight of testimony of party.* In Security National Bank v. Johnson, 195 Okla 107, 169 ALR 790, 155 P2d 249, opinion by Davison, J., it was held that the question whether a statement made by a party testifying as a witness in his own behalf which is inconsistent with other portions of his own testimony and against his interest but which does not amount to an unequivocal concession of fact was an inadvertent and mistaken statement, or was a slip of the tongue revealing the true facts of the case and binding against the party, presents an issue of fact for the determination of the jury and may not be determined by the court as a matter of law.

The annotation in 169 ALR 798 discusses "Binding effect of party's own unfavorable testimony."

Federal Employers' Liability Act — *presumption of negligence.* Mr. Justice Black, of the Supreme Court of the United States, wrote the opinion Jesionowski v. Boston and Maine R., 329 US 452, 91 L ed (Adv 355), 169 ALR 947, 67 S Ct 401, holding that a verdict for plaintiff in an action under the Federal Employers' Liability Act for the death of brakeman who was thrown from a car which was derailed while being moved from one track to another after he had thrown the switch and signaled the engineer to move the cars

may rest upon the presumption of defendant's negligence arising from the circumstances notwithstanding such circumstances include the activities of the brakeman himself, where the jury finds him free from contributory negligence.

A valuable comment note on "Res ipsa loquitur doctrine as affected by injured person's control over or connection with instrumentality" appears in 169 ALR 953.

Grand Jury — *challenging personnel of.* The New York Court of Appeals, in People v. Prior, 294 NY 405, 169 ALR 1157, 63 NE2d 8, held that the exclusion from a grand jury called to investigate election frauds and alleged corruption of county officers, of talesmen who acknowledge acquaintance with persons on a roster which included those whose conduct might be a subject of the grand jury's investigation, is not, though improper, ground for quashing indictments. The opinion was written by Judge Lewis. Three justices dissented in part.

See the annotation in 169 ALR 1169 on the question "Right to challenge personnel of grand jury."

Indictment — *allegation of unlawfulness.* In Gilbert v. State, 198 Miss 175, 169 ALR 164, 21 So2d 914, opinion by McGehee, J., it was held that an affidavit initiating a prosecution for the unlawful possession of intoxicating liquor which charges that defendant had in his possession whisky, against the peace and dignity of the state, will support a conviction although it does not aver that the possession was unlawful, where whisky, as distinguished from alcohol, under no circumstances may be lawfully possessed.

The annotation in 169 ALR 166 discusses "Necessity of alleging in information or indictment that act was 'unlawful.'"

Insurance — *effect of insurer's independent investigation.* The New Jersey Court in an opinion by Justice Wachenfeld held in John Hancock Mutual Life Insurance Co. v. Cronin, — NJ —, 169 ALR 355, 51 A2d 2, that the fact that an insurer makes an independent investigation regarding an application for insurance does not absolve the applicant from speaking the truth in his written application or lessen the right of the insurer to rely upon statements of the insured, unless the investigation made by the insurer discloses facts sufficient to expose the falsity of the representations of the applicant, or which are of such nature as to place the insurer upon duty of future inquiry.

The subject of the annotation in 169 ALR 361 is "Independent investigation by insurer as af-

fecting its right to avoid policy because of misrepresentations in application."

Intoxicating Liquor — *civil damage statute.* A very interesting opinion was written by Justice Smith in Gibbons v. Cannaven, 393 Ill 376, 169 ALR 1190, 66 NE2d 370. It was held that a statute making the owner or lessor of premises jointly and severally liable with the persons selling intoxicating liquors thereon with the former's knowledge for damages sustained as a consequence of the sale of such liquors, and making the building or premises liable for and subject to sale to pay the judgment against the occupant in proceedings brought for that purpose, does not violate the due process clause of the Federal or state Constitution, although a judgment against the occupant becomes a lien on the premises and the owner or lessor has no right to notice of the action against the occupant nor any right or opportunity to appear or defend therein nor to appeal from such judgment.

The broader question "Liability of a lessor or his property for damages resulting from lessee's sale of intoxicating liquor," is discussed in 169 ALR 1203.

Landlord and Tenant — *provision restricting occupancy to adults.* In Lamont Building Co. v. Court, 147 Ohio St 183, 169 ALR 133, 70 NE2d 447, the Ohio Supreme Court, opinion by Judge Zimmerman, upheld a provision in a lease restricting occupancy to adults. The landlord was held entitled to reclaim the premises by an action of forcible entry and detainer when a child subsequently born to the wife of the tenant was brought to live in the apartment. The court found nothing in the public policy of the state which would outweigh the traditional rights of the owner to impose reasonable restrictions as to occupancy.

The annotation in 169 ALR 137 suggests the possibility of a different conclusion in other jurisdictions.

Landlord and Tenant — *sufficiency of notice to quit.* The Connecticut Supreme Court, in an opinion by Justice Dickenson, held in Vogel v. Bacus, 133 Conn 95, 169 ALR 910, 48 A2d 237, that a notice to quit served upon a tenant which describes the leased premises by a street number other than that by which they were described in the lease is, where other premises are known by such number, insufficient as a basis for a statutory action of summary process for possession.

The annotation in 169 ALR 913 discusses "Requisites and sufficiency of notice to quit as condition of summary proceeding to evict tenant."

Mandamus — *inspection of public records.* The Maryland

Court of Appeals, in Pressman v. Elgin, — Md —, 169 ALR 646, 50 A2d 560, opinion by Delaplaine, J., held that the duty imposed upon the Commissioner of Motor Vehicles, by the mandate of the legislature, to keep records of his department open to public inspection is a ministerial duty the performance of which may be compelled by mandamus.

The annotation in 169 ALR 653 discusses "Enforceability by mandamus of right to inspect public records."

Parties — *who may question license tax statute.* An interesting question of "parties of interest," was presented in State v. District Court, — Mont —, 169 ALR 827, 173 P2d 896, opinion by Morris, J. It was there held that private individuals and corporations engaged in production of dairy products in competition with oleomargarine, the state farm bureau, the state grange, and a dairymen's association, interested in the success of the commissioner of agriculture in upholding the validity of an oleomargarine license tax statute in an action brought against the commissioner seeking to have the statute declared unconstitutional, are entitled to intervene in, and become parties to, the action under any one of the three conditions of a statute permitting any person to intervene in an action or proceeding who has an interest in the matter in litigation, is interested in the success of either party, or has an interest against both, regardless of whether such person may be said to have a direct and immediate interest or merely a consequential interest in the action.

The annotation in 169 ALR 851 discusses "Right to intervene in suit to determine validity or construction of law or governmental regulations."

Partnership — *larceny by partner.* An interesting result was reached in State v. Elsbury, — Nev —, 169 ALR 364, 175 P2d 430, opinion by District Judge McKnight. It was there held that as each partner is the ultimate owner of an undivided interest in all the partnership property, none of such property can be said, with reference to any partner, to be "property of another" within the meaning of a general larceny statute so as to subject a partner to conviction of larceny of a partnership bank deposit.

The cases on this point are discussed in the annotation in 169 ALR 372.

Payment — *recovery of payment under invalid contract.* The Kentucky Court followed the majority rule in Watkins v. Wells, — Ky —, 169 ALR 185, 198 SW2d 662, when in an opinion by Dawson, J., it was held that the vendee under an oral agreement for the sale and purchase of real property which

does not satisfy the statute of frauds cannot recover back payments made by him upon the purchase price if the vendor has not repudiated the contract and is ready and willing to perform.

The various views on this question are discussed in the annotation in 169 ALR 187.

Political Parties — *jurisdiction of court to intervene.* Judge Wright, of the Court of Common Pleas, wrote an interesting opinion in Commonwealth v. Dunkle, 335 Pa 493, 169 ALR 1277, 50 A2d 496. It was there held that as courts do not determine political controversies without political parties and do not have general jurisdiction over party committees, a court will not determine a controversy between rival claimants of the office of chairman of a party county committee, where such officer is selected by the party committee and not by the use of the public election machinery.

A supplemental annotation in 169 ALR 1281 discusses "Determination of controversies within political party."

Quasi Contract — *benefits received from use of another's machine.* In Olwell v. Nye & N. Co., — Wash2d —, 169 ALR 139, 173 P2d 652, opinion by Mallery, J., it was held that one who uses without permission the machine of another is liable to the owner for the benefits received under the theory of unjust enrichment.

The annotation in 169 ALR 143 discusses "Owner's right to waive tort of conversion and maintain action on contract implied at law to recover profits which inured to converter from wrongful use of chattel."

Sales — *effect of acceptance of partial delivery.* Justice Brice, of the New Mexico Supreme Court, in Sundt v. Tobin Quarries, 50 NM 254, 169 ALR 586, 175 P2d 684, wrote the opinion holding that the buyer's right to insist upon full performance of a contract to sell and deliver specified quantities of screened sand for use in highway construction work and to recover damages for the seller's failure to deliver the full quantities specified is not waived by buyer's acceptance, after extension of time for delivery, of all sand that the seller could deliver while the construction work was in progress, where letters and other evidence indicate the buyer did all in his power to assist the seller in performing his contract and there is nothing in the evidence to indicate that the buyer accepted the part delivered in full compliance with the contract or that performance, or time of performance after extension of time had been waived.

The annotation in 169 ALR 595 discusses "Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery."

Search and Seizure — *discovering evidence of another crime.* The U. S. Circuit Court of Appeals, Tenth Circuit, in an opinion by Judge Murrah, held in Harris v. U. S., 169 ALR 1413, 151 F2d 837, that officers making a legal search of premises as an incident to a lawful arrest, in the execution of the duly issued warrant of arrest, for the means or instruments of offense for which the arrest was made, may legally seize the instruments or means of committing another and wholly unrelated offense which were unexpectedly uncovered by the search.

The annotation in 169 ALR 1419 discusses "Search incident to one offense as justifying seizure of instruments of or article connected with another offense."

Sewers — *exercise of power of eminent domain for establishment of.* In Charlotte v. Heath, 226 NC 750, 169 ALR 569, 40 SE2d 600, opinion by Seawell, J., it was held that the fact that only sixty-five or seventy persons residing out of but near the city limits will be benefited by an extension of the city's sewerage system to the locality in which they reside does not preclude an exercise of the power of eminent domain to obtain a right of way therefor across private property, so long as the use of the sewer will be available to the general public who may come to reside in the locality served.

The exercise of the power of eminent domain in the establishment of sewers is the subject treated in the annotation in 169 ALR 576.

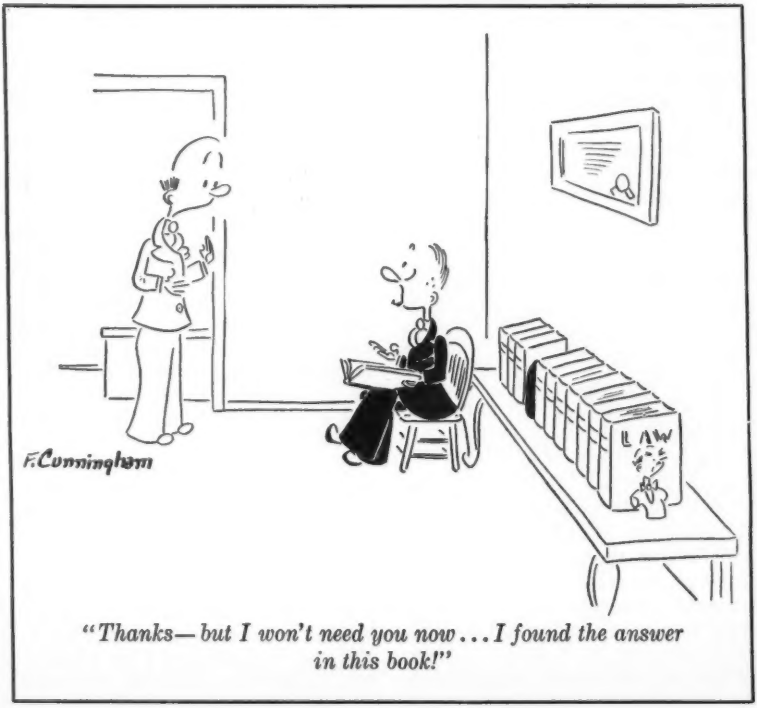
Trade Fixtures — *refrigerating and heating equipment.* The Colorado Supreme Court, opinion by Justice Stone, held in Andrews v. Williams, — Colo —, 169 ALR 471, 173 P2d 882, that refrigerating rooms and a heating room, installed in a warehouse by a tenant conducting a wholesale produce business therein, necessary to adapt the building to the uses of the tenant, and constructed and attached to the building with nails and screws so that they could be removed without material injury to the original structure and leave it as it was when the tenant entered into possession, constitute trade fixtures which the tenant may remove upon the termination of his lease although they are so constructed that they can be removed only by dismantling and removing them piece by piece.

Supplementing an early treatment of the question, the more recent cases are discussed in 169 ALR 478.

Waters — *escape of water from reservoir.* The rule of the celebrated case of Fletcher v. Rylands (1866) LR 1 Ex Ch 265, 1 Eng Rul Cas 236—Ex Ch (affd

in (1868) LR 3 HL 330, 1 Eng Rul Cas 250), was applied in Jacoby v. Gillette, — Wyo —, 169 ALR 502, 174 P2d 505, 177 P2d 204. The opinion was by Riner, J. It was there held that one who maintains an artificial drainage canal is not bound at his peril to so maintain the canal as to carry all flood waters discharged into it without overflowing to the damage of adjoining landowners and is not an insurer against the overflow of water carried, but is liable for damages from the overflow of the canal only upon the basis of some negligence in failing to construct or maintain it so as to meet demands upon its capacity for carrying water which could be reasonably expected to arise.

The annotation in 169 ALR 517 discusses "Liability for overflow or escape of water from reservoir, ditch, or artificial pond."



"Thanks— but I won't need you now . . . I found the answer in this book!"

Wills — *law governing foreign will.* An important decision, written by Justice Smith, in Sternberg v. St. Louis Union Trust Co., 394 Ill 452, 169 ALR 545, 68 NE2d 892, holds that a statute of the state where land is situated providing for the admission to probate of a will that has been admitted to probate outside the state or executed outside the state in accordance with the law of the local state, or of the place where executed, or of the testator's domicil, and that the admission to probate of a will so executed and proved has the same effect in all respects as the admission to probate of a domestic will, is intended merely to establish the validity of the will as against collateral attack unless and until it is contested and set aside in direct proceedings, and does not change the substantive law regarding the disposition of real estate by will, and does not change the common-law rule that questions as to the validity or revocation of a will devising real property are determined by the law of the state where the land is located.

The annotation in 169 ALR 554 discusses "Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state."

Workmen's Compensation — *effect of award in another state.* An interesting constitutional question was presented in Industrial Commission v. McCartin, — US —, 91 L ed (Adv 812), 169 ALR 1179, 67 S Ct 886. Mr. Justice Murphy wrote the opinion holding that the constitutional requirement that full faith and credit be given to statutes of sister states does not make the receipt of workmen's compensation in the state of employment a bar to a subsequent award in the state in which the compensable injury was received where there is nothing in the law of the state of employment to indicate that its workmen's compensation statute is completely exclusive or designed to preclude any recovery by proceedings brought in another state for injuries received there, and the award, which was of a lump sum agreed upon between the employer and the injured person, provided that the settlement should not affect any rights that the injured employee may have under the workmen's compensation act of the state in which he was injured.

See the supplemental annotation in 169 ALR 1185 on "Award under workmen's compensation act as bar to, or ground for reduction of, claim under act of another state."

The Nature of a Mule—A Pleading

By A. Y. ARLEDGE
In the Morehead City, North Carolina
Superior Court, Judge Luther Hamilton, presiding

FOR A Second Further Answer and Defense to the plaintiff's complaint the defendant, Carolina Power & Light Company, says:

1. It is a matter of common knowledge amongst those acquainted with mules, as is the plaintiff in this case, that a mule is endowed with a genius for self-preservation.

In the matter of so-called open dangers a mule in harness may be relied upon to take care of himself. He will skirt the brink of a cliff or a ditch bank with the care and surefootedness of a goat, but in the case of a horse the driver must intervene and substitute his judgment and directing care to prevent him from going over.

In the matter of discovering and avoiding hidden dangers it is common knowledge that a mule has an intelligence far superior to that of man. It is well known that the mule's superior intelligence enables him to know when there is an unsound sill under a bridge without his having to look under it, as a man would have to do; it is well known that he can tell when a bog is miry or when there is quicksand in a stream or ditch without the necessity of stepping into it, as a man would have to do; it is well known that, by pitching his ears forward, he gives to his master positive evidence that he has discovered the approach of a person or an animal long before such animal or person comes within the sight or sound of his master; it is well known that he can detect the presence of a snake hidden in the grass, whether it be in the form of a human being who proposes to do him harm, or whether it be a serpent in *propria persona* vainly lying in wait for an opportunity to sink its fangs in his wily hocks, yet it may be entirely beyond his master's capacity to discover the presence of the snake. A snake-bitten mule is rarely if ever known. There are many other instances far too numerous to recount in which the melancholy and poker-faced mule can sense situations and foresee consequences which may prove adverse to his personal well being, which it is not given to man to sense and foresee.

It is also a matter of common knowledge that a mule is a hybrid—the sterile offspring resulting from the cross of a horse with an ass—a strange creature never intended and apparently

unwelcomed by Nature, so much so that he is denied the power to propagate his own kind, and, indeed, except for man having discovered and taken advantage of a slip in Nature's law his like would not exist at all. Upon such common knowledge a mule was judicially defined by Mr. Justice Brogden in Rector v. Coal Company, 192 NC 804 as follows: "A mule is a melancholy creature. It is *nullius fillius* (a common bastard) in the animal kingdom. It has been said that a mule has neither pride of ancestry nor hope of posterity." However, in spite of judicial pronouncement upon the legal capacity of a human bastard to inherit, it is well known, and is unalterable by judicial fiat, that *nullius fillius* mule does inherit and, therefore, possesses dual but distinctly opposite personalities, representative of the diverse branches of his ancestral tree, which in the realm of man would make him a veritable "Dr. Jekyll and Mr. Hyde." One of those personalities partakes of the nature of the horse family and the other of the ass. When the bridle is on, and he is otherwise convinced that he is under his master's positive restraint, the quality of the horse family dominates him and he acts with the dependable obedience, gentle mannerism, and judicious qualities characteristic of the horse, commonly called "horse sense," and he is worthy of a limited degree of trust; but once the bridle is off and he is loosed from restraint and is on his own the quality of the ass asserts itself, and he displays the vicious attitude and reckless indifference characteristic of the ass, commonly called "jackassery," and those who know him best trust him least; all with the result that in the former case he may be expected to act like an ass's horse and in the latter like a horse's ass, for all of which indeed he is both. Being thus carelessly and negligently allowed by plaintiff to run at large on said Oldham's premises, as aforesaid, and to thus disport himself in his likeness of an ass, as mules are wont to do in such circumstances, and while so doing, said deceased mule knew of, or by the exercise of his aforesaid superior mulish intelligence he could have ascertained, had he but taken the caution to do so, the presence of the alleged deadly current on said wire, but nevertheless the said deceased mule in reckless disregard for his own safety did wantonly and heedlessly run, or did allow himself to be run, into, upon, or against said wire fence and thereby became his own malefactor and the co-author of the delict of which his owner and master now complains.

Tax Laws Are Unfair to Lawyers

By John R. Nicholson

of the Chicago Bar • Reprinted from American Bar Association Journal, April, 1947

LET US imagine the hypothetical case of twin brothers—Henry and Charles. They are alike in every way; they have the same intelligence, personality, likes and dislikes. They receive equal educational training.

By chance, Henry determines to pursue the profession of law, while Charles directs his activities toward manufacturing. Time goes by, and finds Henry as senior partner in his law firm. The clientele is substantial and the firm enjoys a splendid reputation in the community. Charles, too, has prospered. He is now President of the A Manufacturing Corporation.

Both brothers receive substantial incomes. They work equally hard. If any difference is apparent, it would seem that Henry spends more time at the office than does Charles. During this same period, each brother has become a family man; and, strangely enough, the parallel continues in the fact that each of them has three children. Their families live in similar surroundings and acquire much the same habits of life respecting living and educational expenses.

Finally, to complete the cycle, death claims both brothers—let us say on the same day. The story comes to its natural end. One is likely to remark: "Henry and Charles were alike as two peas in a pod. Their lives and fortunes were identical," and so they were to the point of death. There all similarity ceased.

Under the wills of the two brothers, Henry's law firm undertook the administration of both estates. The assets appeared to be roughly equivalent. Henry and Charles each owned comparatively equal homes in the same town. Their bank balances were about the same. The face value of their respective life insurance policies approximated the same sum. BUT, Henry's estate would receive only his undistributed profits from the law firm plus additional amounts under an accounting for his interest in the capital accounts, work in progress, and the like. This summed up Henry's financial matters.

Charles' family was in a much better position with regard to future income. There were Social Security benefits from the

Government. There were dividends on the stock of Charles' corporation, stock received by him under bonus plans in effect during his life. Finally, in point of mention but not importance, there were the death benefits payable to Charles' family under the corporation's Pension Plan.

The Lawyer's Estate in An Unfavorable Position

The net effect of these final differences was that Charles' family was placed in a much sounder financial position than was Henry's. Charles left his family with a secure, comfortable future. Henry, while providing with some adequacy for the future, had done far less in this respect than his brother. The parallel of their lives had been brought to a sudden end by their deaths.

The foregoing "drama" serves to illustrate the position of the professional man engaged in private practice. It applies to all of them—lawyers, doctors, accountants, engineers, brokers —all men for that matter who are engaged in a business or calling in the form of a partnership or individual proprietorship. This article, while applying to the group as a whole, is primarily directed to problems of the lawyers.

The Federal Government has, over the last twenty years, given serious consideration to its responsibilities to the aged and needy. It is clearly established that each individual has an expectancy of only so many productive years. Thereafter he may be unable to support himself financially, but someone must do it. The Government has, for various reasons, assumed such an obligation.

In 1935 the Federal Government enacted "social security" legislation to provide some such support for aged and needy. Such assistance was given to all employees, whether employed by an individual, a partnership or a corporation. Charles, as president of his corporation, came within its purview; Henry, and all other individuals engaged in a profession or partnership business, did not.

Congress also turned to Employees' Trusts as a method of furthering its efforts to carry out its social duties. It encouraged employers to establish such plans by offering them tax relief in the form of deductions in the amount of their contribu-

tions to the plans. Charles, as president of his corporation, became a beneficiary of his corporation's Plan, albeit with certain restrictions; Henry, while he could establish such a Plan for his "employees," could not, nor could his other partners, become a beneficiary of such a Plan.

Other Disparities Against a Law Partner

Even if a law partner resigns himself to the fact that he cannot avail himself of the above-mentioned benefits, further obstacles to making adequate provisions for his family present themselves. The necessity that a law firm maintain an adequate bank balance is well known, whether it be for the payment of employees' salaries, for office supplies, or anything else. In setting aside such amounts to keep the business liquid, the partner is giving up the use of some of his income.

At the same time, the Government collects income tax on the partner's entire distributive share, which includes the sums the partner never drew for personal use. Such a situation, coupled with living expenses and other like items, results in the average lawyer finding himself no younger and not much better off from a standpoint of savings or security for the future, than he was ten or twenty years earlier when his income was much smaller.

No Sound Reason for Excluding Partners

The foregoing is not just "griping" by one of the profession. It is quite generally true that the average lawyer works as long and as hard as the average business man or corporate executive, but has far less to show for it at the end of his active career. He spends a great deal of his time giving his corporate clients the benefit of his advice and legal knowledge. He guides them through periods of change and unrest, contributing as much to a corporation's success as do many of its top-flight executives. The unfairness of the situation is further pointed up when the corporate client calls upon the lawyer to establish a Pension Plan for the company. The lawyer sees and works with the Plan, appreciates the benefits available to the participants, and then realizes that he and his partners cannot avail themselves and their families of such a Plan.

There is no justification, apparent from an economic or social point of view, for excluding partners and individual proprietors from the benefits already discussed. If it is agreed that the reason for establishing such benefits stems from a feeling of social responsibility and a desire to make certain that everyone is assured of adequate income during his later years, why should certain individuals be prevented from attaining such security,

solely by reason of the form of doing business they choose to adopt? When I say "choose to adopt," I am speaking of unincorporated associations in general. In the case of lawyers the situation is further aggravated by the fact that attorneys are prohibited from adopting the corporate form of doing business.

Under the law as it exists today, partner attorneys in private practice cannot participate in any of the benefits of either social security or pension plans. Any amounts set aside by a partner attorney to provide for his family's security after his death have to be accumulated in spite of high income taxes on all his net earnings over the years, in addition to his over-all living expenses. This method of forced savings is not only extremely difficult but at times impossible.

There is no reason apparent why partners should not be able to include themselves as beneficiaries, other than the fact that the applicable section of the Internal Revenue Code refers to plans of an "employer" for the exclusive benefit of his "employees." Since, in dealing with the law, the authorities have difficulty in conceiving that a partner is an "employee," the benefits are withheld. See for example I. T. 3350, 1940–1 C. B. 14 and I. T. 3268, 1939–1 C. B. 196.

That denial of equality to partners stems from theories of what constitutes a "legal entity" and what does not, further serves to point up the artificiality and arbitrary nature of the present situation. The lawyer who is at all familiar with the various problems involved in the law of partnerships realizes that under certain circumstances a partnership is deemed to be an entity separate and apart from the individual members constituting it. However, such fine legal reasoning should not be necessary in a matter of such broad and general interest as this one.

It is submitted that the law as it stands in present form is grossly unfair both from a social as well as an economic point of view. The solution to the problems lies in legislative or administrative enactments or amendments to existing laws and regulations. Study of the problems and obtaining necessary governmental action is worthy of consideration by the entire profession.

He Was Convinced

At a trial of a criminal case, the prisoner entered a plea of "not guilty," when one of the jurymen at once stood up. The judge informed him that he could not leave until this case was tried. "Tried!" repeated the juror, in astonishment. "Why, he confesses that he is not guilty."

A Proposed No Smoking Ordinance

By PETER BALKEMA
of the Olympia (Wash.) Bar

AN ACT Relating to juvenile delinquency, marriage and divorce, curbing inflation, public policy and the promotion of permanent peace, creating certain offices, providing penalties, making an appropriation and declaring an emergency.

PREAMBLE

WHEREAS, smoking cigarets by women of all ages, encourages indulgence therein by youths of tender age, leading to carousing of various sorts, commonly called juvenile delinquency; and

WHEREAS, smoking cigarets by women of all ages, causes divorce, tends to prevent marriage as it discourages the immemorial steps leading to spirited courtships and happy marriages, variously known as necking, hacking, mugging and slooging; and

WHEREAS, smoking of cigarets by women of all ages leads to burned furs, silks, rugs, beds and babies, increasing the demand for same, throwing our economic structure out of gear beyond the present means of production to remedy; and

WHEREAS, smoking of cigarets by women of all ages, pictured in newspapers, magazines, and moving pictures leads to loss of prestige of the United States among the nations of the world, leading to fraternization with the wrong kind of people and provides a valid reason for the maintenance of the iron curtain by Soviet Russia, to prevent contamination of their own society; and

WHEREAS, competition between the various brands of cigarets, between the various odors, smells and the disposition of the ashes and butts therefrom promotes the war between the sexes which the ordinary practices of fraternization cannot overcome, resulting in lowered reproduction and decreased birth rate, which will ultimately result in the subjugation of the United States by more virile and cleaner living peoples;

NOW THEREFORE, Be It Enacted by the Legislature of the State of Washington:

SEC. 1. The smoking of cigarets by women of all ages shall be unlawful.

SEC. 2. The office of breath-inspector is hereby created in each precinct of the state. The precinct committeemen of each party in each precinct shall be ex-officio breath inspectors for their precinct. It shall be their

duty to inspect the breaths of all women in their precinct at least seven times per day; once before breakfast; once after breakfast; one before lunch; once before dinner; once after dinner; once immediately after each woman has retired.

SEC. 3. For refusing to permit her breath to be inspected at any time, a woman shall be guilty of the crime of sabotage and punished as for a misdemeanor.

SEC. 4. No man shall smoke a cigaret in or about any dwelling. Any infraction of the provisions of this section shall be deemed an act of conspiracy to enable the women members of the household to evade the provisions of this act by enabling them to contend that any cigaret smoke, ashes and/or butts were the result of smoking therein by men.

SEC. 5. Every application for divorce upon the part of a woman, and every application for marriage on the part of a woman must be accompanied by the affidavit of such woman that she

"I wish you two would reconsider,—remember you have a wonderful apartment!"

has not smoked a cigaret within one year immediately preceding the date of application. Failure to present such affidavit, or proof that the affidavit is false, even though presented, shall result in refusal of the application in each case.

SEC. 6. Every person who sells or gives to a woman a cigaret, or a puff from his own cigaret shall for each offense be pronounced a woman for one year under the provisions of this act and shall be subject to breath inspection and all prohibitions imposed by this act upon women with the consequent and subsequent penalties.

SEC. 7. Every person who portrays, in an advertisement, a woman smoking a cigaret, or holding, looking at, sitting beside, upon or under a cigaret shall be guilty of a gross misdemeanor and punished accordingly.

SEC. 8. The moneys collected for cigaret taxes shall be placed in a special fund to be known as the "Future of America" fund. Each breath inspector for each inspection made by him shall be entitled to five cents (5¢) to be paid upon a monthly voucher accompanied by a complete list of the persons and the time and place of each inspection: PROVIDED, That no payment shall be made for any inspection made between one o'clock a.m. and five o'clock p.m. except Sundays and holidays, nor for any inspection made in any restaurant, tavern, poolhall, dance hall, honky-tonk, cardroom, club, church, school or cemetery.

SEC. 9. There is hereby appropriated from the Future of America fund the sum of one million dollars ($1,000,000) to the department of conservation and development, who shall make payment therefrom upon vouchers properly drawn and presented by the breath-inspectors. The expense of administration of this act shall be borne by the department of conservation and development as one of the most far reaching constructive means of developing the beauties of the State of Washington.

SEC. 10. This act is necessary for the immediate preservation of the property, people, peace and prosperity of the State of Washington and for the relief of its state institutions, chiefly the insane asylums, houses of correction and parental schools and shall take effect immediately.

When to Bring a Law Suit

"The importance of questions" is "in this ratio: first, costs; second, pleading; and third, very far behind, the merits of the case." Hall v. Eve, 4 Ch D 341, per James, L.J.

Showcase of Our Judicial Process

• By RAY P. BROCKMANN
Judge of the Municipal Court, Los Angeles

• Condensed from Los Angeles Bar Bulletin, July, 1947

WE AS lawyers are apt to be oblivious to the fact that most of the reactions of people to lawyers, judges, and courts and their processes are formed much in the same way as if we were tradesmen, actors, or fisherfolk—or even objects of interest in a display window. True, we blow a few more toots and whistles in the way of ceremony as we set the stage, but sooner or later the backdrop goes up, the illusions are dispelled, and the sight of props and paraphernalia reveals the mechanics of production. Altogether too often, the respect we enjoy or the lack of respect we suffer comes solely from what they see of us as we amble across the courtroom stage.

As a profession we could greatly profit by acknowledging this fact. Especially true is this of our inferior courts, where the common run of litigants and witnesses are not particularly inspired by the lore of the law, its noble heritage, or the lofty principles which guide our courts in their great wisdom. How do we look? How do we act? What do we do? What do we say? These are the ingredients of their conclusion.

There are four ways in which our people glean their impression of our court system. It is either from the newspapers, the movies, through hearsay, or by ocular demonstration. Let us pick up a morning journal. Prominently displayed is a photograph of a comely blonde, apparently sitting in a witness box, but, in fact, a chair set up in the hall outside the courtroom, where the picture was taken. One leg is thrown over the other, and the dress is carefully arranged to make the most of things. She is eating a banana. Under the picture are found these words: "Tells Judge Hubby Locked Her in Clothes Closet All Night." The girl is an unknown, whose name slipped the mind of the reader before the article was finished. The identity of the girl meant even less. The whole story was drummed up for the purpose of entertaining the reader. But the fact that court procedure was tied in with a pair of beautiful legs of a girl eating a banana on the witness stand made it a news story of considerable value.

Let us pass on to the movies. Who among you hasn't cringed as he sat in a movie and watched

an inspired old Thespian go through his antics in the portrayal of a judge. These hundred-dollar-a-day bit players, given a wig of white hair, a black robe, and a large gavel, are in seventh heaven. Add to that the horseplay that goes on in the audience when some key figure stands out dramatically and addresses the court and you get an eyeful of what thousands of people carry away as their impressions of our workshop.

Whenever Henry Smith or Lucy Lane appears in any court, it takes on the proportions of an important event. You may rest assured it will occupy a prominent place not only in their thoughts but in their conversations for days to come. In this way a distorted version of what actually takes place is passed on to many people who are not reached by the first two agencies. It is conviction upon hearsay.

The last channel through which they form their opinions is that which comes by way of ocular demonstration. This is the important one. People may have their minds changed if their impressions come from newspapers, movies, or hearsay, but what they glean by way of an impression growing out of an actual experience in a courtroom is likely to stay with them for their lifetime. From Cucamonga to Sauk Center, by and large, the chances of the average citizen coming into court as a participant are quite remote. In the metropolitan centers, particularly in Los Angeles, with its dense automobile registration, few motoring citizens escape for long. Either through a traffic violation or an accident they are destined to come our way. The rich and poor, the powerful and humble, the virtuous and corrupt—all are worked into the pattern that is being daily woven on the assembly line of our Municipal Court. Spectators by the thousand, both casual and habitual, become courtwise as the daily grind goes on. A quick glance at the figures, and the perspective developed as the parade moves along, suggest a pageantry. If the figurative appellation "showcase" can be used to describe any phase of legal machinery, one could say that the Municipal Court stands out glowingly as the showcase of our judicial process.

Few lawyers are conscious of the fact that whatever impression is formed by these people as they get their glimpse running through the gauntlet of our pressure courts, that impression, be it good or bad, is visited upon every lawyer, every judge, and every court throughout our land. They make no analysis, they make no distinction as to what kind of a court it is. To them it's a court—that's all.

The screech of the siren, the whir of the motorcycle, the pull-up to the curb, the agony of the wait while the ticket is being

filled in, the quick peek to see what speed is being charged—this experience has actually caused heart failure to some. But all of you, I am sure, have felt a depressing sensation from this ordeal, where even the calloused heart responds. After the initial shock, citizen Kane, who feels he has been unjustly dealt with, soon determines his course of action. He first concludes that he does not need a lawyer, or that it would be less expensive to present his defense and be fined than hire one. He is confident that if he has just a few minutes to tell his story in court, the judge will understand.

Let us follow Mr. Kane into court. He walks into a large courtroom where hundreds of his fellow citizens are soon to join him in the closing ceremony of a chain of events and a five-day period of anxiety. The procession begins. The bailiff hustles him into a line which moves continuously. As he marches past the judge a few words are mumbled, first by the judge, then by Kane. Comparing this parade to abattoir routine as cattle are led to slaughter is not a far cry from the truth. The judge chafes under the system. He knows that on Tuesday, Wednesday, and Thursday he must dispose of between 250 and 300 cases in a single court day. He knows that on Monday and Friday he must speed up, for on each of these days 500 cases will move through his courtroom.

Case and Comment
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Ask the average citizen how many minutes he feels he would be entitled to in order to explain his case to the judge. The author has made the inquiry hundreds of times. The average answer is six minutes. That would mean ten cases an hour, or fifty cases in a court day. Seems a reasonable schedule, doesn't it? But the cold fact is that a judge who lingers more than from 30 to 60 seconds on a case will lose ground on a day's calendar.

And this has been going on for

years. Mark this, fellow practitioners, to most citizens who go through this ordeal, the traffic court, in so far as they are personally concerned, holds equal prominence with the Supreme Court. To this man it represents justice or a lack of justice. His respect or lack of respect for that which he has just seen and experienced will last a lifetime. The man who sat on that bench and hustled him through was the symbol of American justice—the brand of justice he in France or his son in Okinawa had been told they were fighting for.

We had better begin now to pick the finest of the fine, the choicest of the crop, to give a character to this court that should have no peer. It will pay you dividends, Mr. Lawyer, if you never step across its threshold. It will pay you dividends, Judges of the Higher Courts, because "as we are, you seem." It will pay you dividends, Mr. John Q. Citizen, because as you travel through life, in all probability your only glimpse of a court will be that which you see as you pass through our portals.

The Zero Hour

A model of terseness and brevity in pleading is contained in this answer received by mail by the Clerk of our Municipal Court, as follows:

"Lake, Calif.
"Nove. 21, 1941.

"Municipal Court
San Diego, Calif.
Your Honor:
In answer to summons # 10481 Ed J. Smith & Son vs. Barker & Son.
We owe Chas. Moreno
We owe Ed J. Smith & Son
We agree to pay Ed J. Smith & Son
Yours truly
Otis Barker
Earl Barker.

A court might readily understand the above to be intended as both a general and specific denial.

Contributor: Judge Joe L. Shell
Municipal Court
San Diego, California.

Come on Up

The language "I want to stay here awhile" addressed by a man to a woman, is not, *per se*, either obscene or vulgar. Stamps v. State, 95 Ga 475, 20 SE Rep 271, per Lumpkin, J.

Factors to Be Considered in the Drafting of a Testamentary Trust

BY KENNETH C. MCCRACKEN

Condensed from Chicago Bar Record, May, 1947

WHEN Robert Benchley was in college he took a course in International Law. He was required at the end of the course to write a paper on a certain treaty between the United States and Great Britain with respect to the North Atlantic Sea Fisheries. Mr. Benchley wrote his paper but from the point of view of the fish.

I propose to discuss the drafting of testamentary trusts largely from the point of view of the trustee. I intend no disrespectful comparison between Mr. Benchley's view-point character and a testamentary trustee, but the law reports are full of cases in which lawyers and their clients have between them drawn up wills that have left the trustee in the unenviable situation that aroused Mr. Benchley's sympathy—and many a trustee has been hooked.

I do not mean to suggest that trustees deserve more consideration than the beneficiaries, but if the wishes of the testator are to be carried out through the trust device, it has to be a device that will work and the test of whether it will work is, in general, to examine it from the point of view of the person who will have to make it work; namely, the trustee.

TYPES OF PROPERTY

Before a lawyer begins to draft any will he should, of course, have a conference with the testator and if the will is to contain trust provisions, this is of even greater importance. The principal thing at such a conference is to obtain an accurate description of the property which is to constitute the trust estate. The testator will tell you about the beneficiaries, of course, but you may have to cross-examine him to find out just what it is that he has to give them.

You should know the amount of insurance he carries, who the beneficiaries are and what the distribution provisions in the policies are. Not only do you want to know about his insurance because of tax considerations, but you will want to be sure that your testamentary provisions are not at cross purposes with his insurance program. The two, of course, must dovetail.

You should particularly find out about his real estate; whether he has real estate in another state; whether it is business property; whether it is subject to a mortgage; and of course, whether it is in joint tenancy, because if it is a joint tenancy, it is not going to pass under his will.

You should also find out the approximate value of his readily marketable securities. You will particularly want to inquire about the testator's business. Find out whether he is a member of a partnership, whether he owns all the stock in a closed corporation or whether he is conducting business in some other form.

It is also well to inquire whether he has any particularly valuable goods and chattels. They are ordinarily not appropriate subjects for trusts and should be disposed of by specific bequests.

I suggest that in inquiring from the testator just what his categories of property may be, that you look over an Inheritance Tax form and get an approximate valuation for each of the schedules that are included there. That will give you a good bird's-eye view of what you are dealing with.

LIABILITIES

You will want to know the approximate amount of the claims and liabilities that are likely to be established against the estate; and, of course, as the Inheritance Tax form will suggest, you will want to inquire whether he has created any trusts during his lifetime and whether he has any interest in any trusts or estates. Also you should inquire whether there is any property over which he has a power of appointment. I don't want to go into that complicated subject, but if there is any property over which your testator has a power of appointment, you must discuss the desirability or undesirability of releasing the power. If it is not to be released be sure that the will is perfectly clear that the testator is exercising or is not exercising the power, as may be desired.

The purpose of finding out all about the testator's property in this way before you begin the drafting job is two-fold. First of all, it will enable you to estimate the total amount of Federal and State taxes. That figure together with an estimate of liabilities and expenses of administration will immediately bring up the problem as to where the money is coming from to pay them. It also focuses attention clearly on how much property and what type of property will be left for the trust estate.

As an example, suppose a man has $50,000 of his own property. Suppose he is fortunate enough to have a power of appointment over $200,000 of other property. It would be fatal for the residuary beneficiary if that man's

will contained the usual provision that all taxes are to be paid out of the residuary estate. In such a case the person receiving the appointed property should certainly bear his share of the taxes. You have, of course, the same situation if the testator has a large amount of insurance and a much smaller amount of property. Here, the residuary beneficiary should not have to bear the burden of taxes on the entire taxable estate, for as you know, the insurance will be included as a part of the testator's estate for Federal Estate Tax purposes.

To Whom, When and How Much

First of all, be sure that all of the income is disposed of. Again and again you find in a will a provision that the principal is to be distributed upon the death of the survivor of the nephews and nieces of the testator living at his death, but there will be gaps as to what happens to income after the death of the first nephews and nieces. It is easy enough to cover a question of that kind, but it means a construction suit if it is not covered.

There is also the question of when income payments for the life tenants are to begin. Is the income to be payable from the date of the testator's death or from one year after death or from the time that the estate is closed? That last standard is a dangerous one because an estate may remain open for years due to a difficult valuation question or some other Federal Estate Tax matter. It is not a bad idea to pin down definitely just when the life tenant's income is to begin.

There is the rather obvious problem of telling the trustee how to make payments of income to minor beneficiaries. One of the purposes of a trust is often to avoid the necessity of opening a guardian's estate in the Probate Court. The trustee should be authorized either to pay income which is due to a minor directly or to expend it for his benefit or to pay the income to a parent or relative with whom the minor may be residing. And the trustee would like to have you add that such a payment is without responsibility on the part of the trustee for its subsequent expenditure, for once he has paid it over he has lost control of it.

In this connection, let me mention the matter of accumulations. We have a Thellusson Act in Illinois, our statute against accumulations. It is probably the most violated statute in the books so far as testamentary trusts are concerned. A violation of it is not too fatal but it is unwise to violate it because very often it does mean a suit for instructions and a settlement with a beneficiary and a great expense to the trust estate.

Let me just mention briefly

the distinction between the rule against perpetuities and the period laid down in the statute against accumulations. In Illinois the period of the rule against perpetuities which is recognized is the historic one of lives in being plus twenty-one years.

There are in general three periods mentioned in our Thellusson Act. You can provide for the accumulation of income during the life of the grantor. That, of course, is not applicable in the case of a testamentary disposition. The second one is however, applicable. That period is twenty-one years after the death of the grantor. The third one is during the minority of any person. I think a safe rule of thumb is to provide for accumulations not longer than twenty-one years after the death of the testator or during the minority of the beneficiaries. I believe it is unobjectionable to provide for accumulations during the minority of a beneficiary who is not in being at the death of the testator.

Consider also whether the income will be sufficient for the needs of the life tenant. It is ordinarily wise to authorize the trustee to invade principal to augment income. It is, of course, unwise to give the life tenant the power to decide how much shall be taken down. There is the danger of giving the life tenant so great a power that the entire trust estate would be taxable in the life tenant's estate on his death. A sound provision is to permit the trustee to invade principal for the life tenant's care and support and in the case of children, education. But you will have to consider, of course, whether you are creating a taxable power of appointment.

It is perhaps unnecessary to mention the desirability of not giving specific sums, but rather giving percentages or fractional proportions of the estate. The difference between giving a beneficiary $50,000 and giving him one-fourth of the trust estate as it may then exist is, of course, obvious.

There is the matter of determining when the various beneficiaries shall receive their shares. That is purely a matter of choice on the part of the testator; as to what he thinks is sound. He may want a daughter's share held for life with gift over to her descendants. He may want his sons to receive half of their shares at twenty-five and the balance at thirty, or in some other way. The only important consideration here is to point out the possibilities to the testator and state clearly in the will what he wants done.

So far as these distribution provisions are concerned, they boil down to the matter of avoiding problems of construction. Try to use plain, clear English that will avoid construction

suits. My practical suggestion on this is that after you have finished your will, have some other lawyer in your office read it over carefully and ask him to raise every question he can think of, primarily possible questions of construction. It only takes a few moments for the draftsman to clarify something that seems ambiguous. The alternative is a construction suit ten years from now with a dozen other lawyers, not including yourself, proving up some tremendous fees against the estate.

Trustee's Powers

It is a fundamental proposition, of course, that the testator should not appoint a trustee in whom he does not have complete confidence, but having appointed a trustee in whom he has complete confidence, the trustee should be given broad discretionary powers. The extreme in that direction would seem to be a simple statement that the trustee can do anything that the testator could do if living, or that the trustee can do anything that he might do if the absolute owner of the property in the trust.

Such a provision is unobjectionable but it will not work if you have that and nothing more. It is not sufficient. The trouble is that when the trustee wants to sell property or borrow or mortgage or take any other specific action, he will have to convince the person with whom he is doing business that he does have authority so to act and he will probably have to point to an express authorization in the trust instrument if he wants to accomplish his purpose.

First and most important is an adequate power of sale. That is an awfully obvious point to mention but it is amazing how often it is omitted and how much difficulty is caused by the omission.

Perhaps next in importance are the investment powers. It is wise to include extensive, or rather comprehensive, investment powers for the trustee.

If the trustee has real estate, give the trustee express powers to lease and to make contracts relating to real estate. It is extremely important to give the trustee an express power to mortgage.

It is, of course, important to authorize the trustee to make distributions in kind, as well as in cash, and to make distribution of undivided interests. A power that I feel is tremendously important is the power in the trustee to apportion all receipts and disbursements between income and principal.

Successor Trustees

Now the matter of successor trustees. There is probably no single defect that brings so many trust estates into courts of equity as the failure to provide for the appointment of successor trustees. Be sure to give the

trustee the right to resign. Unforeseen circumstances will arise that make it necessary for him to resign and again it is undesirable to precipitate an expensive proceeding in equity for the appointment of a successor trustee, when that can be easily covered in your drafting.

The testator may, of course, designate in the will the names of the people whom he wishes as successor trustees. Another common provision is that the present trustee may nominate in writing a successor trustee who will become the successor upon the death, resignation, or inability to act of the present trustee.

My last point on this matter of successor trustees is that it is extremely important to provide that all rights, powers, duties and particularly discretions of the original trustees shall pass to the successor trustee so that every successor trustee will clearly have the same discretionary powers as the original trustee. Otherwise, of course, the question arises as to whether these discretionary powers were personal to the original trustee.

If you have co-trustees, remember that they must all exercise the discretionary powers. Remember also that where you have a corporate trustee and an individual trustee it is going to be awkward if you don't authorize the corporate trustee to be the custodian of the property and authorize the corporate trustee to do the purely ministerial acts in connection with administering the trust.

CONCLUSION

I think I can summarize what I have tried to say by remarking that there is nothing so expensive for your client as a hastily drawn testamentary trust. There is no substitute for sweating over the exact phraseology of every will you draw. When you have completed your draft, go over it from the point of view of the trustee, who is going to live with it year in and year out, and who is going to look at your handiwork a thousand times to find the answers to a thousand questions that are not easily apparent at the time the will is drawn.

May I close by suggesting that a word of prevention at the drafting stage is worth a two-volume brief of cure at the bar of a court of equity and infinitely cheaper for your client and his beneficiaries.